

The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?

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I. Introduction

The General Court's standard of review in competition law cases is under attack. For those who are familiar with EU legal debate nothing new under the sun might be their first thought. However, this first reaction should not lead EU judges to overlook this pressing and insistent criticism. To celebrate its twentieth anniversary, in September 2009 the General Court organised an exceptional event gathering all kind of stakeholders who are involved—in one way or another—in EU judicial proceedings (representatives of European and international institutions, bodies or associations, professors of law, judges and lawyers from all the Member States, companies' managers, agents of EU governments...).¹ They were invited *inter alia* to express their concerns during workshops on the themes 'Quality of justice' and 'Access to justice'. Ways to improve judicial review were then explored² and, repeatedly, observations were voiced against today's relevance of a so-called 'judicial deference' doctrine, which would require from the EU Courts respect for

Key points

- A number of recent comments warned against the light standard of review applied by EU Courts to Commission's complex economic assessments in competition cases.
- A close review of the main judgements on this issue demonstrates the lack of pertinence of most concerns in concretely highlighting the great intensity of the standard of review currently applied by the General Court.
- However, consciousness of today's context in which competition law develops invite judges to clarify any lingering doubts to avoid increasing the Commission's discretionary area.

the Commission's margin of appreciation.³ Doctrine and lawyers have relentlessly continued to take up this concern until now.⁴

* President of the General Court of the European Union. All views expressed are strictly personal and are solely the responsibility of the author. I would like to thank Vivien Terrien for his precious assistance in writing this article, which reflects the situation as to May 2011.

1 The acts of the colloquium organised at the occasion of the 'Celebration of 20 years of the Court of First Instance of the European Communities' on 25 September 2009 entitled 'De 20 ans à l'horizon 2020 Bâtir le Tribunal de demain sur de solides fondations', are published by the Publications Office of the European Union and are also available on the website of the Court of Justice of the European Union at: <http://curia.europa.eu/jcms/jcms/P_52284/> accessed 29 May 2011.

2 As I mentioned in my contribution entitled 'Standard of review in competition cases: can the General Court increase coherence in the European Union judicial system?', in T Baumé, E Oude Elferink, P Phoa and D Thiaville (eds), *Today's Multilayered Legal Order: Current Issues and Perspectives, Liber Amicorum in honour of Arjen WH Meij* (Paris, 2011) footnote 3, p. 116 as a matter of definition, I would quote David Bailey who rightly stated that '[t]he standard of review refers to the intensity with which a court reviews the procedural propriety, factual and legal correctness and merits of a particular case' ('Standard of Proof in EC Merger Proceedings: A Common Law Perspective' (2003) Common Market Law Review 850). Applied to our purpose, 'standard of review is the nature and extent of the enquiry the Court will undertake when faced with an appeal concerning a Commission

decision' (Ian S Forrester, 'A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review' European Competition Law Annual 2009: Evaluation of evidence and its judicial review in competition cases, eds. C-D Ehlermann and M Marquis (Hart Publishing, Oxford and Portland), available at: <www.eui.eu/Documents/RSCAS/Research/Competition/2009/2009-COMPETITION-Forrester.pdf> accessed 29 May 2011). This standard should already be distinguished from '[t]he standard of proof [, which] refers to the threshold that the quality and quantity of evidence must meet before a court can conclude that an event or argument has been proved' (David Bailey, *ibid.*, pp. 854–5). In the context of this article, it 'relates to the level of convincingness which the Commission's Decision must satisfy in proving a competition law infringement' (Ian S. Forrester, *ibid.*).

3 For instance, see M Siragusa, 'Access to the Courts in a Community based on the rule of law', contribution for the workshop 'Access to Justice' organised at the occasion of the 'Celebration of 20 years of the Court of First Instance of the European Communities' on 25 September 2009 (n 1) 129–34.

4 See for instance and among numerous articles, D Geradin and N Petit, 'Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment' (February 2011) TILEC Discussion Paper. See also, L Crofts, 'Tube cartel members put "deferential" General Court review at heart of ECJ challenge' (12 May 2011) MLex Market Intelligence.

Two preliminary observations need to be made. First, I should immediately specify that I fight tooth and nail the reality of such deference. More precisely, as I have already written elsewhere,⁵ I fiercely disagree with this expression to the extent that it would be tainted with an implicit accusation against EU Courts of being biased or, in other words, of violating their duty of impartiality. If, however, the 'judicial deference' doctrine is understood as targeting situations where EU Courts decide to apply a lower standard of judicial review to respect the Commission's margin of appreciation, then what is at stake is the application of a type of standard of review that has a legal qualification: the marginal (or limited) review, as opposed to full (or comprehensive) review.⁶ In the present article, I will not ignore the expression 'judicial deference' doctrine since it is widely used and not always with an inappropriate flavour of favouritism. However, I will use it as it should be, that is as a synonym of marginal review, completely deprived of pejorative meaning.

Marginal review is indeed triggered when EU Courts are invited to examine elements of a decision that has been adopted in consideration of a margin of appreciation that the decision-maker legally enjoys. As a consequence, the EU Courts will limit themselves to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers. The Commission has recognised such discretion in its decision-making process with respect to a certain number of aspects of competition law. The application of a standard of review of a lower intensity reflects the institutional partition of competences between the Commission, entrusted for instance with the enforcement of Article 101 and 102 TFEU, the control of concentrations, and more generally the shaping of EU competition policy, on the one hand, and the EU Courts in charge of reviewing the legality of the Commission decisions, on the other.⁷

Second, one determining aspect of the quality of justice is the Courts' capacity to listen.⁸ I believe that this ability should go beyond the mere exchange of pleadings all along the written and oral procedures to include stakeholders' concerns expressed in conferences and articles. Courts should not be seen as ivory towers and judges must be aware of the legal debates and the context within which they occur. The event organised to celebrate the twentieth anniversary of the General Court clearly pursued this aim. I particularly paid attention to discussions relating to the General Court's standard of review and the so-called 'judicial deference' doctrine. This issue mostly appears in the context of competition law. More specifically, an alleged application of a non-appropriate lower intensity of the standard of review has been predominantly underlined with regard to two issues: EU Courts' assessment of the fine imposed by the Commission to sanction an infringement in cartel proceedings and EU Courts' review of complex economic assessments undertaken by the Commission.⁹ As to the former, in my contribution to Judge Meij's *Liber Amicorum*, I reflected on the necessity of intensifying the judicial review, looking at the current state of play and today's environment surrounding the enforcement of competition rules in the field of cartel proceedings.¹⁰ The purpose of this present article is thus to address the second limb: the General Court's standard of review in competition cases involving complex economic assessments.

From these two introductory observations I draw the content of this article. Indeed, critical observers of the relevant case law dispute, first and foremost, the determination of the situations where EU Courts decide to apply a lower standard of judicial review and, second, the degree of intensity of this application. To understand if marginal review is applied in situations where it should not be, on the one hand, and, on the other hand, when it is applied the General Court leaves the Commission too wide a degree of freedom, it appears that a clear picture of the current standard of review

5 See my contribution entitled 'The Court of First Instance and the Management of Competition Law Litigation', in H Kanninen, N Korjus and A Rosas (eds), *EU Competition Law in Context, Essays in Honour of Virpi Tiili* (Hart Publishing, Oxford 2009) 8. See also my contribution 'Standard of review in competition cases: can the General Court increase coherence in the European Union judicial system?' (n 2) 138.

6 For an analysis of the differences between the two standards of review, see N Wahl, 'Standard of Review—Comprehensive or Limited?', *European Competition Law Annual 2009: Evaluation of evidence and its judicial review in competition cases* (n 2) <<http://www.eui.eu/Documents/RSCAS/Research/Competition/2009/2009-COMPETITION-Wahl.pdf>> accessed 29 May 2011.

7 M Jaeger, 'The Court of First Instance and the Management of Competition Law Litigation' (n 6) 10. For an extended discussion on

this issue, see KPE Lasok, 'The Nature of Judicial Control', contribution for the workshop 'Access to Justice' organised at the occasion of the 'Celebration of 20 years of the Court of First Instance of the European Communities' on 25 September 2009 (n 1).

8 See M Pittie, 'Quelques vues et souhaits de praticien', contribution for the workshop 'Quality of Justice' organised at the occasion of the 'Celebration of 20 years of the Court of First Instance of the European Communities' on 25 September 2009 (n 1).

9 See, for instance, D Gerard, 'EU Antitrust Enforcement in 2025: "Why Wait? Full Appellate Jurisdiction, Now"' (December 2010) *Competition Policy International Antitrust Journal* 5.

10 'Standard of review in competition cases: can the General Court increase coherence in the European Union judicial system?' (n 2).

applied by the EU Courts with regards to complex economic assessments in competition cases is first required. Initially, I will therefore analyse how the General Court's standard of review in such cases can be viewed from outside. In other words, I will examine what can be derived from the relevant case law dealing with these situations, and especially the current intensity of the standard of review the General Court applies in these cases.

Irrespective of the accuracy of the criticisms against the current application of the standard of review in competition cases involving complex economic assessments, the call for an intensification in such situations cannot be ignored. Indeed, the application of a lower standard of review in the case of complex economic assessments together with an expansion of this type of assessment within the Commission's decisions could result in a spread of the marginal review—and, consequently, the decline of the judge's office and, with it, the weakening of the legitimacy of the EU institutional system. To avoid this risk, do we need to marginalise the marginal review? Secondly, therefore, I will consider whether there is a need to improve the General Court's approach, taking into consideration today's context and trying to address voiced concerns.

II. Standard of review regarding complex economic assessments: state of play

Commentators have qualified the attitude of the EU Courts towards the Commission's margin of appreciation as 'judicial deference' since a judicial review of a lower intensity is applied to control the challenged decision.¹¹ Although the space allowed for this article does not permit the details of the history of such an attitude to be examined, it must, however, first recap the major steps of its developments. Indeed, it is by knowing the roots of marginal review that an understanding of this feeling of 'deference' may be discovered. This journey into the past will also offer an opportunity to discuss today's real boundaries of this standard of review, which indubitably do not fit with any qualification of 'deference'.

A. Roots of the 'judicial deference' doctrine

If marginal review saw the light of the day in competition law within the context of judicial control of the rules relating to agreements, its application has been extended to other aspects of this field such as merger control and the abuse of a dominant position.¹²

1. Birth of the marginal review in the context of Article 101(1) and (3) TFEU

Early in its judicial history, the Court of Justice demonstrated its desire to leave room for the Commission in the sphere of economic matters when this institution was exercising its margin of discretion. The marginal review was born. The General Court has followed this path scrupulously.

a. The Court of Justice's 'deference' towards the Commission. Judges' confrontation with the economic environment in which disputes before the EU Courts take place is not in itself a new, nor even a recent phenomenon. Often quoted as the landmark judgment setting the principles of the Court's judicial review regarding economic matters in antitrust proceedings, Joined Cases 56 & 58/64 *Consten and Grunding*—adopted in 1966—called into question a decision of the Commission applying EU cartel rules to an individual case; the Court had to review the legality of a refusal to grant exemption under the (now) Article 101 TFEU to an agreement concluded between the parties. In its assessment of the restriction on competition caused by the disputed agreement under Article 101(1) TFEU, the Commission took into account the whole distribution system set up by Grunding. The Court underlined the necessity of placing the debate in its economic and legal context¹³ and stated that '[i]n order to arrive at a true representation of the contractual position the contract must be placed in the economic and legal context in the light of which it was concluded by the parties. Such a procedure is not to be regarded as an unwarrantable interference in legal transactions or circumstances which were not the subject of the proceedings before the Commission.'¹⁴ This approach was self-qualified of comprehensive judicial review.¹⁵

11 This article deals only with the standard of review applied to complex economic assessments present in cases raising issues based on Article 101 TFEU, Article 102 TFEU and merger control rules. State aid cases are thus excluded from the scope of the analysis.

12 For a brief history of the evolution of the margin of appreciation doctrine in the EU Courts' case law, see H Schweitzer, 'The European Competition Law Enforcement System and the Evolution of Judicial Review', European Competition Law Annual 2009: Evaluation of evidence and its judicial review in competition cases (n 2) 16–18,

<<http://www.eui.eu/Documents/RSCAS/Research/Competition/2009/2009-COMPETITION-Schweitzer.pdf>> accessed 29 May 2011.

13 Joined Cases 56 and 58/64 *Consten and Grunding v Commission* [1966] ECR 299.

14 Joined Cases 56 and 58/64 *Consten and Grunding v Commission*, (n 13) 343. However, it should be remembered that in this case, the Court was satisfied with a finding of absolute territorial protection and considered it useless to consider economic data.

15 Case 42/84 *Remia v Commission* [1985] ECR 2545, p. 34.

When reviewing the Commission's assessment to exempt the agreement under Article 101(3) TFEU—which had been eventually denied—the Court specified that '[a] judicial review of [the Commission's complex evaluations on economic matters] must take account of their nature by confining itself to an examination of the relevance of facts and of the legal consequences which the Commission deduces therefrom.'¹⁶ The principle of marginal judicial review in situations where the Court has to control complex assessments of economic issues by the Commission was thus affirmed. Twenty years later, the Court specified that comprehensive judicial review in the context of Article 101(1) TFEU could be set aside and replaced with marginal judicial review when the Commission has to appraise complex economic matters; 'the Court must therefore limit its review ... to verifying whether the relevant procedural rules have been complied with, whether the statement of reasons is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of power.'¹⁷

b. The General Court's 'deference' towards the Court of Justice's 'deference' to the Commission. The heritage of such approach has been well received and understood by the General Court since its establishment. For instance, in February 1994, the General Court expressly indicated that 'review undertaken by the Court of the complex economic appraisals made by the Commission when it makes use of the discretion conferred on it by Article [101(3)] of the Treaty, with regard to each of the four conditions laid down in that provision, is necessarily limited to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers'.¹⁸ This position is constantly restated as shown recently in *GlaxoSmithKline*.¹⁹

With regards to the marginal review in the context of Article 101(1) TFEU, the General Court applied *Remia*'s ruling in its judgment *Métropole télévision*²⁰ and, again, in *GlaxoSmithKline*,²¹ where it stated that 'the Court hearing an application for annulment of a decision applying Article [101(1) TFEU] must undertake a comprehensive review of the examination carried out by the Commission, unless that examination entails a complex economic assessment, in which case review by the Court is confined to ascertaining that there has been no misuse of powers, that the rules on procedure and on the statement of reasons have been complied with, that the facts have been accurately stated and that there has been no manifest error of assessment of those facts.'

2. Extension of the marginal review to merger control and article 102 TFEU

Following on from litigation relating to rules on agreements, the EU Court's understanding of the limited scope of judicial review when faced with the Commission's discretion in economic matters spread to the other branches of competition law, from rules on mergers and acquisitions to the assessment of the abuse of dominance.

a. Marginal review applied to the Commission's discretion in merger control. In its judgment *Kali und Salz*,²² the Court of Justice applied the said 'deference approach' in the context of merger cases. It indeed drew attention to the same need to consider the Commission's margin of discretion when reviewing merger decisions involving an appraisal of economic matters: 'the [Merger] Regulation ... confer[s] on the Commission a certain discretion, especially with respect to assessments of an economic nature. Consequently, review by the [EU] judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic

16 Joined Cases 56 and 58/64 *Consten and Grunding v Commission*, (n 13) 347.

17 Case 42/84 *Remia v Commission*, (n 15). See also, Joined Cases 142/84 and 156/84 *BAT and Reynolds v Commission* [1987] ECR 4487, para. 62; and Case C-7/95 *P Deere v Commission* [1998] ECR I-3111, para. 76.

18 Joined Cases T-39/92 and T-40/92 *Groupeement des Cartes Bancaires « CB » and Europay International SA v Commission* [1994] ECR II-49, para. 109. See also, Case T-29/92 *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid and Others v Commission* [1995] ECR II-289, para. 288.

19 Case T-168/01 *GlaxoSmithKline v Commission* [2006] ECR II-2969, para. 241, upheld on appeal by Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline v Commission* [2009] ECR I-9291, para. 85.

20 Case T-112/99 *Métropole télévision and Others v Commission* [2001] ECR II-2459, para. 114: '... it must be observed that, inasmuch as the assessment of the ancillary nature of a particular agreement in relation to a main operation entails complex economic assessments by the Commission, judicial review of that assessment is limited to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been a manifest error of appraisal or misuse of powers (see, to that effect, with regard to assessing the permissible duration of a non-competition clause, *Remia v Commission*, paragraph 34).'

21 Case T-168/01 *GlaxoSmithKline v Commission*, (n 19) para. 57.

22 Joined cases C-68/94 and C-30/95 *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission* [1998] ECR I-1375.

nature which form part of the rules on concentrations.²³

The General Court's attitude towards this approach in such a context was questioned when it adopted its three judgments *Airtours*,²⁴ *Schneider*,²⁵ and *Tetra Laval*²⁶ annulling the Commission's decisions prohibiting three different operations. There is no need to recap the entire story behind these three annulments. It should just be remembered that, although the General Court quoted *Kali und Salz*'s ruling recognising the Commission's margin of discretion with respect to assessments of an economic nature,²⁷ some observers wondered whether the General Court did not reserve to itself the prerogative of considering *de novo* whether or not the substantive analysis was correct.²⁸ In that sense, it would set a stricter standard of review than previously, going beyond what was normally expected from the Commission to prove the legality of its decision. The Commission challenged the *Tetra Laval* judgment before the Court of Justice, arguing that, whilst claiming to apply the test of manifest error of assessment, in fact the General Court applied a different test requiring the production of 'convincing evidence' and thus failed to take into account the discretion conferred on the Commission with regard to complex factual and economic matters.²⁹ In doing so, argued the Commission, the General Court 'departed from principles laid down by the Court of Justice in its judgment in *Kali und Salz* in terms of both the nature of judicial review carried out by it and the standard of proof which it required the Commission to satisfy.'³⁰ However, the Court of Justice dismissed the appeal.³¹ In response to the alleged change of the standard of review, the Court noted that the General Court was right to find, in reliance on, in particular, the judgment *Kali und Salz*, that the Commission's analysis in the present case was of the type that called for a close examination of the circumstances which are relevant for an assessment of that effect on the conditions of competition in the reference market.³²

Moreover, as regards the alleged change of the standard of proof, it stressed that, in requiring convincing evidence, 'it by no means added a condition relating to the requisite standard of proof but merely drew attention to the essential function of evidence, which is to establish convincingly the merits of an argument or, as in the present case, of a decision on a merger.'³³ Therefore, the Court of Justice concluded that the General Court observed the criteria to be applied in exercising the EU Courts' power of judicial review, explaining and setting out the reasons why the Commission's conclusions seemed to be inaccurate in that they were based on insufficient, incomplete, insignificant, and inconsistent evidence.³⁴

The General Court's attitude in adopting the three annulments judgments, therefore, was not a sign of a different approach towards the said 'deference' doctrine. As Judge Meij observed, the General Court's judgment in the *Tetra Laval* case, rather than being an intensification of the judicial review of the Commission's economic assessments, was an attempt to specify the standard of proof.³⁵ More recently, this approach was followed as regards the Commission's assessments of commitments in Case T-87/05 *EDP/Commission*.³⁶ Finally, it should be noted that the *Tetra Laval* ruling maintains its relevance under the new merger regulation adopted in 2004,³⁷ as shown in Case T-342/07 *Ryanair v Commission*.³⁸

b. Marginal review applied to Commission's discretion in Article 102 TFEU. In its judgment *Kish Glass*,³⁹ the General Court had to review the Commission's definition of the market, on which it would eventually find that no dominant position was held by the company against which the complaint was filed. 'As a preliminary point, the [General Court] observe[d] that, according to consistent case-law, although as a general rule the [EU] judicature undertakes a comprehensive review of the question whether or not the conditions for the

23 Ibid., paras 223–224.

24 Case T-342/99 *Airtours v Commission* [2002] ECR II-2585.

25 Case T-310/01 *Schneider Electric v Commission* [2002] ECR II-4071.

26 Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381.

27 Case T-342/99 *Airtours v Commission*, (n 24) para. 64; Case T-5/02 *Tetra Laval v Commission*, (n 26) para. 119.

28 Bailey 'Standard of Proof in EC Merger Proceedings: A Common Law Perspective' (n 2) 861.

29 Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, para. 19.

30 Ibid., para. 25.

31 Ibid.

32 Ibid., para. 40.

33 Ibid., para. 41.

34 Ibid., paras 48–49.

35 A Meij, 'Judicial Review in the EC Courts: *Tetra Laval* and Beyond', in O Essens, A Gerbrandy and S Lavrijssen (eds), *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing, 2009) 19.

36 Case T-87/05 *EDP v Commission* [2005] ECR II-3745, paras 63 and 151. See also, Case T-158/00 *ARD v Commission* [2003] ECR II-3825, para. 194.

37 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ 2004 L 24, p. 1.

38 Case T-342/07 *Ryanair v Commission* 6 July 2010, not yet reported, para. 29.

39 Case T-65/96 *Kish Glass v Commission* [2000] ECR II-1885, upheld on appeal by order of the Court of Justice in Case C-241/00 P *Kish Glass v Commission* [2001] ECR I-7759.

application of the competition rules are met, its review of complex economic appraisals made by the Commission is necessarily limited to verifying whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers.⁴⁰

This 'preliminary' observation, applying the philosophy determined by the Court of Justice as regards complex economic assessments, shows that, in the context of Article 102 TFEU, the General Court follows the same approach as in the other fields of competition law. This is particularly material due to the fact that complex economic appraisals mainly concern the key element of an analysis under Article 102 TFEU, that is the market definition on which the existence of a dominant position will be determined. Among other aspects, it has been seen in the judgments in Case T-201/04 *Microsoft*,⁴¹ Case T-301/04 *Clearstream*,⁴² Case T-57/01 *Solvay*⁴³ and Case T-321/05 *AstraZeneca*.⁴⁴

The General Court also applied the marginal review standard with regard to other aspects of Commission's analysis under Article 102 TFEU, such as parts relating to the analysis of the abuse itself. In that regard, it referred to the *Deutsche Telekom* case where what was at stake was the method used by the Commission to proceed to the necessary calculations in a situation of margin squeeze,⁴⁵ the *Wanadoo* case where both the choice⁴⁶ and the application⁴⁷ of the method of calculation of the rate of recovery of costs in a situation of predatory pricing were contested, and the *Microsoft* case where the Commission's analysis of the degree of interoperability required for the competitors to remain viable in the market was elevated to the rank of complex economic assessments.⁴⁸

B. Moot 'judicial deference' doctrine?

The deferential language affirmed in all branches of competition law has thus given birth to the so-called

'judicial deference' doctrine. Seen as an abandonment by the judge of its power of control, this language only pertains to the recognition of the balance of powers as wished by the Founding Fathers. Indeed, a closer examination of the relevant case law reveals the willingness to apply an intense—though marginal—review when confronted with complex economic assessments. However, this message may not always appear to be clear due to variations in judicial decisions.

1. A forgotten paragraph

The General Court's repeated endorsements of the principle that it will not interfere with how the Commission has exercised its discretion is often criticised.⁴⁹ However, this deferential language should not be given precedence over another statement that immediately followed the paragraph presenting the so-called deference approach; a statement that should be even less overlooked, although some commentators do.⁵⁰

As seen above, on appeal of the General Court's judgment *Tetra Laval*, the Court of Justice upheld the lower court's application of the *Kali und Salz* ruling. It brought an interesting precision stating that '[w]hilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that *does not mean* that the [EU] Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. *Not only* must the [EU] Courts, *inter alia*, establish whether the evidence relied on is factually accurate, reliable and consistent *but also* whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. Such a review is all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect.'⁵¹

This approach has since been applied in other merger cases.⁵² In the context of a similar issue to the

40 Case T-65/96 *Kish Glass v Commission* [2000] ECR II-1885, para. 64.

41 Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, para. 482.

42 Case T-301/04 *Clearstream v Commission* [2009] ECR II-3155, para. 47.

43 Case T-57/01 *Solvay v Commission* [2009] ECR II-4621, para. 250.

44 Case T-321/05 *AstraZeneca v Commission* 1 July 2010, not yet published, para. 32.

45 Case T-271/03 *Deutsche Telekom v Commission* [2008] ECR II-477, para. 185, upheld by Case C-280/08 P *Deutsche Telekom v Commission* 14 October 2010, not yet published, para. 143.

46 Case T-340/03 *France Télécom v Commission* [2007] ECR II-107, para. 129, upheld by Case C-202/07 P *France Télécom v Commission* [2009] ECR I-2369.

47 Case T-340/03 *France Télécom v Commission* (n 46) para. 163, upheld by Case C-202/07 P *France Télécom v Commission* (n 46).

48 Case T-201/04 *Microsoft v Commission*, (n 41) para. 379.

49 See, for instance, IS Forrester, 'A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review', (n 2) 16–25; and M Siragusa, 'Access to the Courts in a Community based on the rule of law', contribution for the workshop 'Access to Justice' organised at the occasion of the 'Celebration of 20 years of the Court of First Instance of the European Communities' on 25 September 2009 (n 4).

50 See D Slater, S Thomas and D Waelbroeck, 'Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?', GCLC Working Paper 04/08, p. 43.

51 Case C-12/03 P *Commission v Tetra Laval*, (n 29) para. 39 (emphasis added).

52 Among the most recent examples, it could be referred to Case T-151/05 *NVV v Commission* [2009] ECR II-1219, para. 54 and Case T-342/07 *Ryanair v Commission* (n 38) para. 30.

one raised in *Tetra Laval*—conglomerate mergers—the General Court restated the ‘forgotten’ paragraph in its non-appealed *General Electric* judgment and specifically underlined that, despite the Commission’s margin of assessment when applying the substantive provisions of the Merger Regulation, its control applies to the Commission’s legal classification of economic data.⁵³ The General Court went even further emphasising that although such an approach applies to all appraisals of an economic nature, ‘effective judicial review is all the more necessary when the Commission carries out a prospective analysis of developments which might occur on a market as a result of a proposed concentration.’⁵⁴ With this language, one can infer that, despite the acknowledgement of the existence of a margin of discretion when the Commission has to assess complex economic matters, the General Court demonstrates an assured willingness to exercise a deep review of the said Commission’s analysis.⁵⁵ Looking attentively at the degree of judicial review effectively applied in this case, it emerges that the General Court exercised a thorough, meticulous and precise review that led commentators to consider that the ‘judgment... sets forth a rigorous standard of judicial review.’⁵⁶ Still in the context of merger control, similar declarations of intent to conscientiously apply its marginal review to elements where the Commission enjoys a margin of discretion can be observed in each and every step leading to the adoption of a merger decision, such as the Commission’s requests for information⁵⁷ or an assessment of commitments⁵⁸ and, each time, were

actually followed by a detailed review of such elements.⁵⁹ A recent example of the thoroughness of the General Court’s control in the area of economic analysis can be found in the *Ryanair* judgment where econometric studies are discussed in great detail.⁶⁰

Although affirmed in the context of its legality control of merger decisions, the General Court’s willingness to apply an intense—though marginal—review when confronted with the Commission’s assessments of complex economic matters is far from limited to this limb of competition law. Recently, addressing judicial review in cases under both Articles 101 and 102 TFEU, the General Court specified in its judgment *Amann & Söhne and Cousin Filterie* that ‘although it is true that where... [a] finding [of infringements of Articles 101 and 102 TFEU] involves complex economic... appraisals, the case-law recognises that the Commission has a certain discretion, that discretion is *never* unlimited.’⁶¹ It then restated the words of the ‘forgotten’ paragraph. More specifically, as regards the review of such economic matters in Article 101 TFEU cases, although the General Court noted in its judgment *GlaxoSmithKline*⁶² that it is not for it ‘to substitute its own economic assessment for that of the institution which adopted the decision the legality of which it is requested to review’,⁶³ it recalled the extent of its duty as specified in the ‘forgotten’ paragraph.⁶⁴ These preliminary considerations expressed in the context of a review of the Commission’s refusal to grant exemption under Article 101(3) TFEU found a particular resonance in this case since this part of the decision was annulled on the

53 Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, para. 63.

54 *Ibid.*, para. 64 (emphasis added).

55 The acknowledgement of this willingness by two economists specialised in antitrust economics should be here pointed out, see C Caffara and M Walker, ‘An Exploration into the use of Economics before Courts in Europe’ (2010) 1 (2) *Journal of European Competition Law & Practice* 160: ‘The [General] Court is now clearly comfortable with hearing economic presentations, as illustrated for instance by the hearing of the *Ryanair/Aer Lingus* appeal...—where all sides... were subjected to extensive and informed questioning by the judges on the merits of the econometric evidence they had relied upon.’

56 J Killick, ‘The GE/Honeywell judgment—in reality another merger defeat for the Commission’ (2007) 28 (1) *European Competition Law Review* 61. In the same sense, see, for instance, S Goodman, ‘Court of First Instance Upholds Prohibition of *General Electric/Honeywell*’ (Spring 2006) 2 (1) *Competition Policy International*, who acknowledges the close review of the evidentiary basis of the Commission decision; S Baxter, F Dethmers and N Dodoo, ‘The GE/Honeywell judgment and the assessment of conglomerate effects: what’s new in EC practice?’ (April 2006) *European Competition Journal* 141–67, who draw from this case that, if the Commission enjoys a wide discretion as regards the type of economic analyses that it may conduct and the economic theories on which it may rely in its decision, its

appraisal is subject to judicial review; I Girgenson, ‘GE/Honeywell: une victoire à la Pyrrhus pour la Commission?’ (2006) 6 *Revue Lamy de la Concurrence* 14, who even sees in this judgment the General Court’s willingness to shrink the Commission’s margin of discretion in the field of merger law.

57 Case T-145/06 *Omya v Commission* [2009] ECR II-145, para. 32.

58 Case T-48/04 *Qualcomm v Commission* [2009] ECR II-2029, para. 92.

59 As an illustration of this careful review, see, for the necessity to request some information, Case T-145/06 *Omya v Commission* (n 57) paras 60–80; and for a recent example regarding assessment of commitments, see Case T-342/07 *Ryanair v Commission* 6 July 2010, not yet reported, paras 447–525.

60 Case T-342/07 *Ryanair v Commission* (n 38) paras 139–195.

61 Case T-446/05 *Amann & Söhne and Cousin Filterie v Commission* 28 April 2010, not yet published, para. 131 (emphasis added).

62 Case T-168/01 *GlaxoSmithKline v Commission* (n 19).

63 *Ibid.*, para. 243. See also, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline v Commission* [2009] ECR I-9291, paras 86 and 88.

64 Case T-168/01 *GlaxoSmithKline v Commission* (n 19) para. 242, upheld on appeal by Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline v Commission* (n 63), paras 78–88, especially para. 87. However, see below notes 81–84 and text accompanying.

ground of failure to conduct a proper examination in taking seriously the applicant's arguments and then carrying out the required complex assessment.⁶⁵ This judgment is also relevant to the intensity of application of the marginal review in the light of the Commission's margin of discretion in complex economic matters in the context of Article 101(1) TFEU. Although the General Court did not mention the fact that it is not restricted from reviewing the Commission's interpretation of information of an economic nature, in its control of the Commission's analysis under Article 101(1) TFEU it rejected a *per se* approach consisting of limiting itself to finding an anticompetitive object where the contested clause had the intention to treat parallel trade unfavourably and stated that it required an analysis that took into account the legal and economic context and was designed to determine whether it has as its object or effect the prevention, restriction, or distortion of competition on the relevant market.⁶⁶ Therefore, in the context of competition rules on agreements, the General Court's intention to thoroughly review economic analysis for which a certain margin of discretion is recognised to the Commission is—as is the case in the context of a judicial review of merger assessments—followed by an actual detailed examination.

Finally, the same observations apply to Article 102 TFEU cases, as it can be observed, for instance, in the non-appealed judgment in Case T-201/04 *Microsoft*. In this case, the General Court had to examine *inter alia* the conditions on which an undertaking in a dominant position may be required to grant a licence covering intellectual property rights. To reach the conclusion that one of these conditions—the elimination of competition—was satisfied, the Commission first had to define the relevant product market. Although this definition is subject to limited review, it is clear from the judgment that, nonetheless, the Commission's analysis underwent a detailed analysis.⁶⁷ In Case T-301/04 *Clearstream*, the General Court followed the same reasoning. It first stated that '[i]t should be noted, at the outset, that in so far as the definition of the product market involves complex economic

assessments on the part of the Commission, it is subject to only limited review by the Community judiciary' but then specified that 'this does not prevent the Community judiciary from examining the Commission's assessment of economic data' and restated the intensity its review must have, as described in the 'forgotten' paragraph.⁶⁸ Looking at the actual General Court's analysis on this issue that immediately follows, it can be indubitably concluded that its thoroughness is in compliance with the declaration of intent.⁶⁹ Similar observations can be made with regard to the General Court's examination of the Commission's appraisal of the competitive interaction between two pharmaceutical products—an issue which was considered 'complex'—in Case T-321/05 *AstraZeneca*, where parts of the relevant product market definition were also contested.⁷⁰ The latest striking example to date illustrating the intensity of the General Court's standard of review applied to complex economic assessments in Article 102 TFEU cases comes from a judgment adopted on 15 December 2010 in Case T-427/08 *CEAHR v Commission*.⁷¹ In this case, the CEAHR challenged the Commission decision rejecting its complaint against several Swiss manufacturers of luxury watches on grounds of a lack of Community interest. To determine this interest, the Commission enjoys wide discretion. Moreover, the question of the definition of the relevant market—which was key to this case involving after-market analysis—was raising complex economic assessments, thus subject to limited review. However, the judgment reviewed extensively the Commission's statements in relation to market definition and eventually found a manifest error of assessment, which ultimately vitiates the Commission's reasoning as to the Community interest's insufficiency. It derives from this ruling that the application of marginal review did not prevent the annulment of the challenged decision and '[b]y virtue of the General Court's strict scrutiny in the CEAHR case, the obligation for the Commission to consider attentively all the matters of facts and law which the applicant has brought to its attention—in order to assess the Community interest related to the case—has become a material one.'⁷²

65 Case T-168/01 *GlaxoSmithKline v Commission* (n 19) paras 303–307, upheld on appeal by Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline v Commission* (n 63) para. 85.

66 Case T-168/01 *GlaxoSmithKline v Commission* (n 19) paras 109–119. However, see below notes 79–80 and text accompanying.

67 Case T-201/04 *Microsoft v Commission* (n 41) paras 479–532.

68 Case T-301/04 *Clearstream v Commission* (n 42) para. 47. For a comment of this case, see A. Ezrachi, 'Comment on *Clearstream*' (2009) 1 (2) *Journal of European Competition Law & Practice* 125–6.

69 Case T-301/04 *Clearstream v Commission* (n 42) para. 48–74.

70 Case T-321/05 *AstraZeneca v Commission* (n 44) paras 28–222, esp. paras 33, 61, 85–106.

71 Case T-427/08 *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v Commission* 15 December 2010, not yet published.

72 P. van Ginneken, 'The CEAHR Judgment: Limited Discretion to Reject Complaints', *Journal of European Competition Law & Practice*, Advance Access published on 5 May 2011. See also, A. Mikroulea, 'Rejection of complaint, lack of Community interest, obligation of motivation: how does that all fit together?' (2011) 2 (3) *Journal of European Competition Law & Practice* 241–4.

This short journey through the main and most recent case law of the General Court tends to demonstrate that, first, the requirements surrounding the application of marginal review make this standard of review far from light; second, the General Court illustrates this understanding by constantly affirming its willingness to thoroughly review elements despite the fact that they belong to the Commission's margin of discretion; and, finally, the General Court's actual control goes beyond its mere declared intention to conduct a deep examination of those elements in practice leading—if need be—to the annulment of the challenged decision.

2. An unforgiving paradigm

If the General Court's message as to its willingness to review Commission's assessments of complex economic matters through an intense—though marginal—review seems to be clear, the intervention of the Court of Justice may, however, confuse the issue in the eyes of interested observers.

A first example could be taken from judicial review in merger control. On 13 July 2006, the General Court overturned regulatory approval for Sony and Bertelsmann to combine their music units to form the world's second-largest record label.⁷³ In this judgment, the General Court reviewed the Commission's assessment of the creation or the strengthening of an existing collective dominance. In its examination of one of the criteria developed in the *Airtours* judgment—market transparency—with regard to alleged opacity of campaign discounts, the General Court noted that

the [Commission's] findings relating to campaign discounts are not only based solely on the data relating to the parties to the concentration but that, in addition, the tables setting out those data were prepared by those parties (or their economic advisers) according to a methodology and on the basis of data selected by the parties themselves, while there is *no indication that the Commission ascertained whether they were accurate, relevant or objective and representative*. Although, as the Commission stated at the hearing, the procedure for the control of concentrations does indeed rely to a large extent on trust, as the Commission cannot be required to ascertain on its own, in the slightest detail, the reliability and accuracy of all the information submitted to it, *it cannot, on the other hand, go so*

far as to delegate, without supervision, responsibility for conducting certain parts of the investigation to the parties to the concentration, in particular where, as in the present case, those aspects constitute the crucial element on which the decision is based and where the data and assessments submitted by the parties to the concentration are diametrically opposite to the information gathered by the Commission during its investigation and also to the conclusions which it drew from that information.⁷⁴

From such statements, it can be observed that the General Court's ruling was thus based on a willingness, effectively, to be in a position to thoroughly exercise its standard of review. On appeal, the Court of Justice ruled that 'in so far as the [General Court] carried out an *in-depth examination* of the evidence underlying the contested decision when considering the arguments raised before it, it *acted in conformity* with the requirements of the case-law set out [in *Kali und Salz* and *Tetra Laval*]'⁷⁵ If, at first sight, such praise sounds like a recognition of a proper understanding from the General Court of the intensity of its standard of review to be applied to complex economic matters, the Court of Justice's judgment did not follow the General Court in its attempt to ascertain that its control of essential elements of the decision will be exercised on reliable information. Indeed, the Court of Justice ruled that the General Court made several mistakes, set aside the judgment and referred it back to the General Court to re-examine the case again.⁷⁶ Worthy of particular notice is the following consideration from the Court of Justice: 'the [General Court] committed an *error of law*, first, in requiring, in essence, that the Commission apply particularly *demanding requirements as regards the probative character of the evidence and arguments* put forward by the notifying parties in reply to the statement of objections and, secondly, in finding that the lack of additional market investigations after communication of the statement of objections and the adoption by the Commission of the appellants' arguments in defence amounted to an unlawful delegation of the investigation to the parties to the concentration.'⁷⁷

Looking at the appeal of General Court's judgment *GlaxoSmithKline*, another illustration is found in the context of a judicial review of the Commission's

73 Case T-464/04 *Impala v Commission* [2006] ECR II-2289, para. 328.

74 *Ibid.*, para. 415 (emphasis added).

75 Case C-413/06 P *Bertelsmann and Sony Corporation of America v Impala* [2008] ECR I-4951, para. 146 (emphasis added).

76 Case C-413/06 P *Bertelsmann and Sony Corporation of America v Impala* (n 75). On referral, the General Court rendered an order without re-examining the case because in the meantime the Commission indicated

that it was in agreement with the applicant's statement that the action had become devoid of purpose and took the view that there was no need to adjudicate on it, Order of 30 June 2009 in Case T-464/04 *Impala v Commission* [2006] ECR II-2289.

77 Case C-413/06 P *Bertelsmann and Sony Corporation of America v Impala* (n 75) para. 95 (emphasis added).

assessments under both articles 101(1) and 101(3) TFEU. As to the former, the Court of Justice informed the General Court's approach as to whether the agreement had an anticompetitive object.⁷⁸ As explained above, the General Court departed from a *per se* analysis and preferred a deeper review of the assessment of the clause. The Court of Justice found that 'by requiring proof that the agreement entails disadvantages for final consumers as a prerequisite for a finding of anti-competitive object and by not finding that that agreement had such an object, the [General Court] committed an error of law.'⁷⁹ On the latter point, the Court of Justice confirmed the General Court's approach on the allocation of the burden of proof and the standard of proof required in relation to Article 101(3) TFEU.⁸⁰ However, it must be noted that this endorsement is exclusively based on, and underlines, the deferential elements contained in the General Court's judicial review. Indeed, the Court of Justice backed up the first instance reasoning because '[i]t correctly stated that, when dealing with an application for annulment of such a decision, it carries out a restricted review of its merits.'⁸¹ The Court of Justice further specifies that '[t]his is fully in keeping with the principle that review by the [EU] judicature of complex economic assessments made by the Commission must necessarily be confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers.'⁸² And it does not forget to conclude in noting that '[t]he [General Court] added that it is not for it to substitute its economic assessment for that of the institution which adopted the decision whose legality it is requested to review.'⁸³

Finally, in the context of Article 102 cases, the Court of Justice has considered in its judgment *Alrosa*⁸⁴ that the General Court went beyond the degree required to review complex economic matters. In July 2007, the

General Court annulled the Commission's decision adopted under Article 9 of Regulation 1/2003 accepting commitments offered by DeBeers to address abuse of dominance concerns regarding its purchase of rough diamonds from the Russian state-owned company, Alrosa. To reach this ruling, the General Court *inter alia* considered both the joint commitments proposed by the two companies (mainly, a progressive sales reduction)—rejected by the Commission—and the later DeBeers' unilateral proposed commitments (a total sales ban)—eventually accepted.⁸⁵ The judgment found that, in accepting the latter commitments whereas the joint commitments were sufficient to address the anticompetitive concerns and not be taken into consideration on the basis of an alleged difficulty in determining them, the Commission infringed the principle of proportionality.⁸⁶ However, the Court of Justice considered that 'the General Court expressed its own differing assessment of the capability of the joint commitments to eliminate the competition problems identified by the Commission, before concluding... that alternative solutions that were less onerous for the undertakings than a complete ban on dealings existed in the present case'⁸⁷ and '[b]y so doing, the General Court put forward its *own assessment* of complex economic circumstances and thus substituted its own assessment for that of the Commission, *thereby encroaching on the discretion enjoyed by the Commission* instead of reviewing the lawfulness of its assessment.'⁸⁸ Some commentators considered the General Court's judgment in *Alrosa* as a radical one imposing strict requirements on the Commission and being overly intrusive on the Commission's discretion, whereas the Court of Justice's judgment went radically in the opposite direction, departing from its own case law and showing utmost deference to the Commission's margin of appreciation, conducting a weak judicial review.⁸⁹

Therefore, it seems that the relevant case law dealing with the issue of the standard of review to be applied

78 Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline v Commission* (n 19) paras 57–64.

79 *Ibid.*, para. 64.

80 *Ibid.*, paras 78–88.

81 *Ibid.*, para. 84.

82 *Ibid.*, para. 85.

83 *Ibid.*, para. 86.

84 Case T-170/06 *Alrosa v Commission* [2007] ECR II-2601.

85 *Ibid.*, paras 86–158.

86 *Ibid.*, paras 154–157.

87 Case C-441/07 P *Commission v Alrosa* 29 June 2010, not yet reported, para. 66. For an overview of the Court of Justice's judgment, see C Little, 'Boost for Commission's Antitrust Enforcement Policy: ECJ Overturns General Court's Decision in De Beers Case' (2010) 1 (6) *Journal of European Competition Law & Practice* 508–10.

88 Case C-441/07 P *Commission v Alrosa* (n 87), para. 67 (emphasis added).

89 See, for instance, F. Cengiz, 'Judicial review and the rule of law in the EU competition law regime after *Alrosa*' (April 2011) *European Competition Journal* 149–53; R García-Valdecasas and A Montesa Lloreda, 'A New Life for Commitment Decisions under Article 9 of Regulation 1/2003? The Aftermath of the ECJ Judgment of 29 June 2010 in Case C-441/07P, *Commission v. Alrosa*', *Today's Multilayered Legal Order: Current Issues and Perspectives, Liber Amicorum* in honour of Arjen W. H. Meij (n 2) 112; D Gerard, 'Alrosa, negotiated procedures and the procedural economy/due process conundrum—one step forward, three steps back?' (6 July 2010) *Kluwer Competition Law Blog*: <<http://kluwercompetitionlawblog.com/2010/07/06/alrosa-negotiated-procedures-and-the-procedural-economy-due-process-conundrum-%E2%80%93-one-step-forward-three-steps-back/>> accessed 29 May 2011.

to complex economic assessments in competition law cases seeks to conciliate two principles—reflected in *Tetra Laval*'s two cited paragraphs: on the one hand, a clear intense control of all elements on which the Commission relied leading to its appraisal—especially those expressed in the judgment of the General Court; and, on the other hand, recognition of a certain discretion on the part of the Commission in recalling that marginal review prevents judges substituting their own appreciation to the decision-maker's—as brought out in some recent judgments by the Court of Justice. Having regard to the above, I wonder whether one keeps on qualifying the General Court's review as judicial deference...

Contrary to what is mostly thought, marginal review does not constitute in itself a risk of non-effective judicial review since it still entails intense control of most of the elements of the decision challenged. Having in mind the case law related above, an issue could however emerge if Courts hesitate in determining the limits of the Commission's discretion area. Indeed, it would lead them to refrain from applying the intensity contained in this standard of review to situations where they should not.

This exercise—a review of relevant case law and defining the real state of the law on this issue—was, in my eyes, necessary to restore the naked and plain truth too often concealed under inappropriate or biased comments. Once done, we can thoughtfully examine claims relating to the urgent need to shrink the application of marginal review as far as possible. In other words, we can now ask ourselves whether this state of play is satisfactory or whether it needs to be thought through to determine how to respond properly to accusations of potential inadequacy with regard to the event triggering the application of the marginal review or to the intensity of the standard of review.

III. Towards a marginalisation of the marginal review?

Commentators' fears with regard to the state of today's case law could be summed up as being the risk of something of a 'relinquishment' by the judge of his or

her office in favour of some kind of 'consecration' of the Commission's discretion in all aspects involving economic matters. First, the relevance of such claims needs to be examined. In that regard, today's environment has to be analysed in order to be able to understand which substrate principles set out in the main judicial decisions apply and confront their adequacy to this context. Second, if relevant, the way(s) to address the identified concerns must be sought.

A. Context: the rise of economics

Judges devote themselves to the examination of the rules. However, the environment in which these rules are shaped has drastically changed over the years welcoming economic theories and new actors well-versed in economics and finance.

1. Economic-inspired 'legislation'

As for any court, the General Court's main task is to control the proper application of legal texts and, to the extent necessary, construe the provisions. Competition law has undergone a major change in the last decade with an acceleration of the penetration of economic-inspired 'legislation'.⁹⁰ The legal texts the judges are confronted with are now peppered with economics. This is the result of the so-called 'more economic' approach of the Commission,⁹¹ a response to what was previously criticised as a heavy reliance on *per se* rules that disregarded the need to demonstrate market failure or harm to consumers. It would sound uninspired today to illustrate this evolution by mentioning the application of the SIEC⁹² test or the addition of the Chief Economist to the DG Competition team. However, what may appear more interesting is that these changes were not anecdotal and this trend has been confirmed to be the norm irrespective of the competition field concerned. A brief overview, although non-exhaustive, of some of the latest developments may be quite illustrative.

In EU merger law, the implementation of a more economic approach is often seen as a reaction to the 2002 General Court's annulments of the three Commission decisions described above, namely *Tetra Laval*, *Schneider*, and *Airtours*.⁹³ The tendency has not

90 See, for instance, J Almunia, 'Staying ahead of the curve in EU competition policy', GCLC's Fifth Evening Policy Talk, Brussels, 19 April 2011, Speech/11/291, p. 2.

91 For a brief historical description of this approach, see N Forwood, 'The Commission's More Economic Approach—Implications for the role of the EU Courts, the treatment of economic evidence and the scope of judicial review' European Competition Law Annual 2009: Evaluation of evidence and its judicial review in competition cases (n 2):

<<http://www.eui.eu/Documents/RSCAS/Research/Competition/2009/2009-COMPETITION-Forwood.pdf>> accessed 29 May 2011.

92 SIEC stands for 'Significant impediment to effective competition'.

93 See, among many others, A Christiansen, 'The "more economic approach" in EU merger control—A critical assessment', 1 March 2006, Deutsche Bank Research, Working Paper Series, Research Notes 21; and JP van der Veer, 'The use of empirical techniques in European

changed as illustrated by the adoption of non-horizontal merger guidelines.⁹⁴ Most of the time, these types of mergers—involving companies with vertical and conglomerate relationships—benefit from a favourable presumption of legality, seen as improving the efficiency of the companies and ultimately benefiting the consumer. After public consultation on the draft guidelines, the Commission indicated that ‘most commentators . . . acknowledged that the draft represented the state-of-the-art of the established economic literature in the field’.⁹⁵ In the final guidelines, various scenarios illustrate the way the Commission plans to assess market power, competitive harm, and pro-competitive effects stemming from efficiencies benefiting consumers, reflecting the economic theories the Commission intends to pursue. For instance, with regard to the assessment of incentives of a vertically integrated firm to partially or fully foreclose its downstream rivals by restricting their access to an important input (input foreclosure), the Commission proposes to look at pre-merger up- and down-stream margins.⁹⁶ The place of economics then becomes essential in the debate between the merging parties and the Commission.⁹⁷

On 3 December 2008, the Commission unveiled its guidance on the application of Article 102 TFEU to single firm conduct.⁹⁸ This document represents an expression of the ‘more economic approach’ in the field of abuse of dominance, ‘set[ting] out an economic

and effects-based approach to exclusionary conduct under [EU] antitrust law.’⁹⁹ Indeed, ‘[t]he Guidance Paper is intended to contribute to the process of introducing a more economics based approach in European competition law enforcement. . . . The Commission will base itself on convincing evidence and sound economic analysis on how and whether the reduction in competition is likely to lead to consumer harm.’¹⁰⁰ In that regard, in order to identify likely consumer harm the Commission clearly states that it can rely not only on qualitative evidence but also, where possible and appropriate, quantitative evidence.¹⁰¹ It is true that a number of factors that the Commission considers relevant to its assessment of anticompetitive foreclosure still belong to a structural view of the market.¹⁰² However, the proposed analytical framework clearly departs from many form-based rules and makes large use of economic principles.¹⁰³

In distribution, the Commission’s revision of the block exemption on vertical restraints in 1999 somehow kicked off the ‘more economic approach’ stressing the need to take into account the economic effects of vertical agreements,¹⁰⁴ and thus showing a favourable reception for economic insights in EU competition law. The revised block exemption regulation for vertical agreements adopted on 20 April 2010 follows the same path.¹⁰⁵ As to the innovations, it could be noted, first, that an economic theory of buyer

Commission merger cases’ (March 2011) 1 Competition Policy International Antitrust Chronicle 2.

94 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18 October 2008, p. 6.

95 Commission press release, ‘Mergers: Commission adopts Guidelines for merging companies with vertical or conglomerate relationship’, IP/07/1780, Brussels, 28 November 2007, p. 2. Indeed, see, for instance, R O’Donoghue and D Parker, ‘Viewpoint: The final piece in the jigsaw: an analysis of the draft European Commission guidelines on non-horizontal mergers’ (March 2007) eSapience Center for Competition Policy.

96 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (n 94) para. 40 s.

97 See for a critical discussion of this approach, R Inderst and T Valletti, ‘Incentives to Foreclose’ (March 2009) 1 Global Competition Policy.

98 Communication from the Commission—Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, p. 7, 24 February 2009.

99 Commission press release, ‘Antitrust: consumer welfare at heart of Commission fight against abuses by dominant undertakings’, IP/08/1877, Brussels, 3 December 2008.

100 Commission memorandum, ‘Antitrust: Guidance on Commission enforcement priorities in applying Article 82 to exclusionary conduct by dominant forms—frequently asked questions’, MEMO/08/761, Brussels, 3 December 2008.

101 Communication from the Commission—Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (n 98) para. 19.

102 See D Geradin, ‘Is the Guidance Paper on the Commission’s Enforcement Priorities in Applying Article 102 TFEU to Abusive Exclusionary Conduct Useful?’, 12 March 2010: <<http://ssrn.com/abstract=1569502>> accessed 29 May 2011.

103 See, for instance, F Rosati, ‘The EU Commission’s Guidance on exclusionary abuses: A step forward or a missed opportunity?’ (2009) 2 Concurrences 9–13. On the specific issue of loyalty discounts, see G Federico, ‘The Antitrust Treatment of Loyalty Discounts in Europe: Towards a more Economic Approach’ (2011) 2 (3) Journal of European Competition Law & Practice 277–84.

104 Council Regulation (EC) No 1215/1999 of 10 June 1999 amending Regulation No 19/65/EEC on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices, OJ L 148, p. 1, 15 June 1999, recital 8.

105 See R Subiotto and C Dautricourt, ‘The Reform of EU Distribution Law’ (2011) 34 (1) World Competition—Law and Economics Review 49: ‘Although the new Regulation’s spirit and content do not deviate much from those of its predecessor, the Commission has updated the framework for assessment of vertical restraints on the basis of two major economic developments that occurred during the course of the last decade, namely the increased power of large retailers as well as the growing importance of Internet sales and advertising.’ See also, L Vogel, ‘EU Competition Law Applicable to Distribution Agreements: Review of 2010 and Outlook for 2011’ (2011) 3 Journal of European Competition Law & Practice.

power finds a place in the new regulation, now being a criteria to be considered for the exclusion of the exemption benefit.¹⁰⁶ Second, even if criticism has been heard against the persistence of listing resale price maintenance among the hardcore restrictions,¹⁰⁷ one may observe that, for example, the prohibition of resale price maintenance¹⁰⁸ may be challenged by evidence of efficiencies,¹⁰⁹ which in turn will oblige the Commission to effectively assess the likely negative impact on competition before making an ultimate assessment of whether the conditions of Article 101(3) TFEU are fulfilled. What may seem at first sight to be a harsh way to prove a pro-competitive effect must be toned down in consideration of the fact that the Commission specifies that these two distinct steps may in practice be an iterative process where the parties and Commission, in several steps, enhance and improve their respective arguments.¹¹⁰

On 4 May 2010, the Commission launched a public consultation to review its guidelines on horizontal cooperation agreements,¹¹¹ which led to the adoption of a communication setting out new guidelines.¹¹² Among the innovations the revised 'Horizontal Guidelines' contains, one should be particularly noted: for the first time, it provides general guidance on the legality of the exchange of information.¹¹³ Although recent case law could have invited the Commission to adopt a close to *per se* condemnation approach of such practices,¹¹⁴ its new guidelines take a more economic approach as evidenced by its statement concerning assessment of the restrictive effect on competition of information exchange where economic conditions on the relevant markets are clearly put forward as an essential element to be taken into account.¹¹⁵

Finally,¹¹⁶ it is noteworthy, though unsurprising after the non-exhaustive list of economic-inspired com-

106 Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, p. 1, 23 April 2010, Article 3(1). For an overview of the new regulation's modifications, see M Brenning-Louko, A Gurin, L Peepkorn and K Viertiö, 'Vertical Agreements: New Competition Rules for the Next Decade', DG Competition's Competition Policy Newsletter 2010–2: <http://ec.europa.eu/competition/publications/cpn/2010_2_4.pdf>.

107 See, for instance, P Lugard and T van Dijk, 'The New EC Block Exemption for Vertical Restraints: A Step Forward and a Missed Opportunity' (June 2010) 2 Competition Policy International Antitrust Journal; Y Botteman and KJ Kuilwijk, '(Minimum) Resale Price Maintenance Under the New Guidelines: A Critique and A Suggestion' (June 2010) 1 Competition Antitrust Journal; Subiotto and Dautricourt, 'The Reform of EU Distribution Law' (n 105) 50; and See also, Vogel, 'EU Competition Law Applicable to Distribution Agreements: Review of 2010 and Outlook for 2011' (n 105).

108 Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (n 106) Article 4(1).

109 Some examples of efficiencies are given in the Commission Notice—Guidelines on Vertical Restraints, OJ C 130, p. 1, 19 May 2010, para. 225. See, also, C. Vilmart, 'La nouvelle exemption des accords de distribution: une insécurité grandissante', JCP—La Semaine juridique, Edition Entreprise et Affaires no. 23, 10 June 2010, 1556, pp. 17–22, who insists on the strengthening of the role economic analysis can play in overturning the presumption of restriction.

110 Commission Notice—Guidelines on Vertical Restraints (n 109) para. 47.

111 Commission press release, 'Competition: Commission consults on review of rules applicable to horizontal co-operation agreements', IP/10/489, Brussels, 4 May 2010.

112 Communication from the Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements', OJ C 11, p.1, 14 January 2011.

113 Ibid., point 2, p. 13.

114 Many commentators have criticised the Court ruling in Case C-8/08 *T-Mobile Netherlands BV and Others v NMa* [2009] ECR I-4529 for not requiring an analysis of actual or likely harmful effects to conclude to the existence of a wrongful restriction of competition, see for instance A Reindl, 'Information Exchanges Among Competitors: The Commission Takes a New Look' (September 2010) 1 Competition Policy International.

115 Communication from the Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' (n 112) para. 75. For comments on the guidelines, see F Jenny, L Flochel and F Ninane, 'The economics of informations exchange', *Concurrences*, no. 2–2011, no. 35650. For detailed comments on the draft guidelines, see PD Camesasca, AK Schmidt and MJ Clancy, 'The EC Commission's Draft Horizontal Guidelines: Presumed Guilty when Having a Chat' (2010) 1 (5) *Journal of European Competition Law & Practice* 412; and A Reindl, 'Information Exchanges Among Competitors: The Commission Takes a New Look' (n 114).

116 Although, as previously mentioned (see n 11) this article does not deal with anti-competitive State measures, it could be mentioned that the same trend can be observed in this field of law. Indeed, the Commission launched in 2005 the so-called State Aid Action Plan ('State Aid Action Plan—Less and better targeted state aid: a roadmap for state aid reform 2005–2009', COM (2005) 107 final of 7 June 2005), 'a comprehensive, coherent and far-reaching reform of [S]tate aid policy' (N Kroes, 'Reforming Europe's State Aid Regime: An Action Plan for Change', Wilmer Cutler Pickering Hale and Dorr / University of Leiden Joint conference on European State Aid Reform, Brussels, 14 June 2005, Speech/05/347, p. 2). One of the four essentials of this plan was described as the emphasis on refined economic analysis as a means to ensure a proper and transparent evaluation of State aid ('State Aid Action Plan', paras 21–22; see also, N Kroes, 'The refined economic approach in state aid law: a policy perspective', GCLC/College of Europe Conference, Brussels, 21 September 2006, Speech/06/518). For a discussion of this approach, see Monopolkommission, 'The "More Economic Approach" in European State Aid Control', Translated Version of Chapter VI of the Biennial Report 2006/2007, Bonn, November 2008.) Almost five years afterwards, and although the economic crisis has shaken up the application of EU State aid rules, (see the set of Commission's 'economic crisis' measures: <http://ec.europa.eu/competition/state_aid/legislation/temporary.html>) the Commissioner stressed that the Commission revised almost all its rules in this field, achieved a great deal in modernising this policy and delivered on the pillars of the State Aid Action Plan, among which is a broader use of refined economic approach, which makes the Commission's policy more intelligible, and supports the targeting of aid (N Kroes, 'Better targeted aid is the name of the game', Keynote address at conference organised by European State Aid Law Institute, London, 27 November 2009, Speech/09/05, pp. 2–3.) Although the actual European Commissioner in charge of competition has not yet explicitly emphasised as much as his predecessor the need to strengthen the economic approach in the State Aid field, he does not seem to be willing to depart from this trend (see, for instance, his following speeches: 'Competition, State aid and

petition 'legislation' drawn up above, to mention that, on 6 January 2010, the Commission published a document called 'Best practices for the submission of economic evidence and data collection in cases concerning the application of article 101 and 102 TFEU and in merger cases'.¹¹⁷ Although provisionally applied since that date, they were submitted to a public consultation, the consequences of which are not yet known. This initiative aims to enhance the transparency and predictability of Commission antitrust proceedings, conscious of the increasing importance of economics in complex cases, whether in the Commission's requests to run econometrics analysis or in parties' submissions to substantiate their arguments.

Competition law is by its very nature anchored in the world driven by economic theories. However, an antitrust regulatory framework has not always been so permeable to economic concepts and the associated literature.¹¹⁸ This brief overview of the recent legislative environment shaping competition law demonstrates today's ubiquity of economics in this field of law and confirms that the era of the *per se* approach may be coming to an end. This development definitely derives from the willingness of apprehending increasingly complex issues with a pluridisciplinarity approach. Following the same reasoning, in order to understand today's context which has given rise to the rules subject to EU Courts' review, one should—in addition to the evolution of the legislative environment—take into consideration a sociological element: the evolution in the nature of the actors working with these rules.

2. Economic-inspired appointments and players

The General Court's main interlocutors in competition litigation are, to put it simply, on the one hand, the Commission's officials from the Directorate General for Competition ('DG COMP') and their representatives in court, that is the agents of the Commission's legal

service, and, on the other hand, the companies represented by their lawyers, most of the time specialised EU competition lawyers.

As to the Commission, it is worth noting that recent major appointments have confirmed the trend towards a more economic approach. First, it may be remembered that, following an economist with an academic background from 1999 to 2004, the choice of European Commissioner for competition turned to someone involved in the business world who had worked on the board of commissioners of several multinational corporations. The current European Commissioner responsible for Competition Policy, who took office in February 2010, was previously Commissioner for economic and monetary affairs for six years. Among various other positions held within the Commission, the current Director General—economics-trained as was his predecessor—spent ten years at the Directorate General for Economic and Financial Affairs. Is this somehow to be understood together with the establishment—several years ago—within DG COMP of the Chief Competition Economist, always chosen from among internationally renowned economists?¹¹⁹ The Commission's legal service seems to follow the same path. Prior to his nomination on 1 June 2009, the Commission legal service's head was the Director General of the Commission's Directorate General for Budget for seven years. Also worth mentioning, the most recent appointment of someone who studied economics is a man who has just taken up the post of Deputy Director General for State aid in DG Competition, leaving his position as director for policy strategy and coordination at DG Economic and Financial Affairs, and having previously served in DG Enterprise as a director dealing with industrial policy and economic reform.¹²⁰

In terms of lawyers, the interesting trend lies in their submissions, which are increasingly accompanied by economic studies. Today, 'a myriad

Subsidies in the European Union', 9th Global Forum on Competition, Paris, 18 February 2010, Speech/10/29, p. 3, in which he describes the EU system for reviewing State subsidies, and specifies that this review is 'based on an economic assessment of the impact of the measure'; 'Competition and Regulation: Micro-economic support for macro-economic recovery', London School of Economics, London, 14 June 2010, Speech/10/312; and, on the possible consideration of efficiency gains in the scrutiny of large-scale commercial services, 'Reforming EU State aid rules on public services: The way forward', EPC policy Dialogue, Brussels, 2 May 2011, Speech/11/300, p. 5).

¹¹⁷ This document was actually published together with two other documents, respectively called 'Best practices on the conduct of proceedings concerning Articles 101 and 102 TFEU' and 'Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (ex-articles 81 and 82 EC)'. These documents are available on DG COMP's website at: <<http://ec.europa.eu/competition/antitrust/legislation/legislation.html>>.

¹¹⁸ See E Fegatilli and N Petit, 'Économétrie du droit de la concurrence—Un essai de conceptualisation', GCLC Working Paper 03/08, pp. 6–10; and G Vallindas, 'Le Tribunal et la concurrence: le juge face aux appréciations économiques complexes', *Revue des Affaires Européennes* (R.A.E.)—Law & European Affairs (L.E.A.) 2009–2010/3, footnote 97 and accompanying text p. 447.

¹¹⁹ Before taking office, all three Chief Competition Economists appointed until now were holding teaching positions in leading academic institutions. For information on the current Chief Competition Economist, see the webpages dedicated to his role within the DG COMP at the following address: <http://ec.europa.eu/dgs/competition/economist/role_en.html> accessed 29 May 2011.

¹²⁰ See S Taylor, 'Two deputy directors-general appointed in DG Competition', *European Voice*, 5 May 2011; see also, L Crofts, 'Koopman to oversee state aid policy in DG Competition', *MLex Intelligence*, 27 October 2010.

of consultancy firms provides micro-economic studies or other type of economic studies to support competition lawyers' work.¹²¹ A study on 'Competition economics and antitrust in Europe' traces back the evolution of economic consultancy firms on the market for EU advice.¹²² It shows that whereas until the late 1980s economic advice was marginal in antitrust proceedings and mostly undertaken by individual academics, the market for EU related advice grew rapidly in the late 1990s, as the number of merger notifications grew but also following the implementation of the notice on market definition, explicitly using economic concepts. As an illustration of this phenomenon, two economists mentioned the fact that '[s]tarting with the appeal of *Tetra/Sidel* under an accelerated timetable in 2001, all hearings on merger decisions at the [General Court] in Luxembourg have featured economists—including most famously in *GE/Honeywell* (with as many as eight economists taking the stand).'¹²³

The age of the lawyers' monopoly is over. By that I mean the time when lawyers were at the head of regulatory departments, authorities, or institutions dealing with competition issues, relegating economists, business-oriented, or finance-trained persons to advisory positions has passed and it has given way to a more diversified human landscape in which competition rules are shaped and implemented.

To some extent, this analysis of contextual elements could flesh out the fear of seeing marginal review expand within the judge's office. As I wrote elsewhere, bearing in mind the existence of a certain degree of discretion conferred upon the Commission by the relevant regulations, I fully believe that the role of the judge is not that of substituting its own appreciation to that of the Commission.¹²⁴ However, such an approach should have no influence on the exercise of effective control over Commission decisions in the competition field. 'Effective', here and today, means in my view that one must seriously reflect on the consequences of the economics spill-over era to avoid an extension of the margin of discretion and its corollary, a reduction of the review area.

B. Consequences on the standard of review in cases involving assessments of economic matters

The pertinence of the claims derives first from the actual diffusion of economics within competition law and, second, reasonable doubts about the determination of the triggering element of marginal review. Indeed, as indicated above, the risk of EU judges misunderstanding the limits of the Commission's discretion area cannot be excluded considering the state of today's case law. A clear determination of the limits of the margin of appreciation doctrine in that regard and, thus, the type of situations where the judge applies a less intensive standard of review would probably be welcome.¹²⁵ For this purpose, the meaning of the expression 'complex economic assessments' needs to be cleared up. I should add that this call for clarity is more than a wish but a must. 'Complex economic assessments' is the criteria triggering the intensity of judicial control and, with regard to the environment just described, it would be unacceptable to run a risk of misunderstanding the place of economics within the judge's control and leave it in the hands of a non-judicial authority.

1. Need to define when

The element triggering the General Court's marginal review is the notion of complexity. Indeed, only complex economic assessments are submitted to a limited judicial control. All other economic assessments are, as well as any other legal or factual issues, examined under the comprehensive standard of review by the General Court.

A simplistic interpretation would be to consider that 'complex' relates to an assessment that is difficult to understand because of the underlying economic theories exposed. However, this does not seem to be what the Court of Justice expects from the General Court. Indeed, in the Court's judgment *Woodpulp*,¹²⁶ not only the judges reviewed substantial body of economic arguments—qualified by the Advocate General to be of manifest complexity—but they also engaged their own economic experts to draft reports, later submitted to the parties' comments. The illustrations given by the

121 'CCBE comments on Commission consultation on Best practices in antitrust proceedings and submission of economic evidence; Hearing Officers' guidance paper', Brussels, 19 March 2010.

122 D Neven, 'Competition economics and antitrust in Europe' (October 2005) Economic Policy 748 s.

123 C Caffara and M Walker, 'An Exploration into the use of Economics before Courts in Europe' (n 55).

124 'The Court of First Instance and the Management of Competition Law Litigation' (n 5) 9.

125 In that regard, see H Schweitzer, 'The European Competition Law Enforcement System and the Evolution of Judicial Review', European Competition Law Annual 2009: Evaluation of evidence and its judicial review in competition cases (n 2) 53–5; <<http://www.eui.eu/Documents/RSCAS/Research/Competition/2009/2009-COMPETITION-Schweitzer.pdf>> accessed 29 May 2011.

126 Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others v Commission* [1993] ECR I-1307.

General Court's judgments in *Airtours*, *Tetra Laval*, or *Ryanair*, closely reviewing new economic theories advanced by the Commission or detailed econometrics studies, also do not seem to embrace such an interpretation.

It also cannot imply that judicial review of the concerned assessment would be overly time-consuming. This would be an easy way for the General Court to take shortcuts under pressures of time. It should be here recalled that the jurisdiction faces immense backlog challenges and has to make a judgment with only a reasonable delay at the risk of being sanctioned by the Court of Justice as in the *Der Grüne Punkt* case.¹²⁷ Of course, this introduces the dilemma of the interests of effective justice.¹²⁸ To apply a lighter standard of review in order to be quicker in adopting a judgment would be quite a provocative idea...

Does it encompass economic reasoning that has to be applied to a puzzle of facts and, as a result, becomes hard to decipher? I remember that in the *Cement case*,¹²⁹ the General Court had to deal with what was, admittedly, a complex set of facts. Would intervention of basic economic reasoning have led the jurisdiction to apply a lighter standard of review? This could be inferred from an *a contrario* analysis of a General Court statement in *Holcim*.¹³⁰ Indeed, it noted that in relation to a particular development in the *Cement* judgment a comprehensive review was undertaken and then specified that this development 'make[s] no reference to economic appraisals made by the Commission or to any discretion on its part that might have limited the scope of the review carried out by the [General Court]'.¹³¹ If such economic appraisals—not necessarily complex—were present, would the standard of review be lighter? Or, maybe, this statement meant that the degree of complexity of the then present economic appraisal would have been assessed to decide what type of judicial review had to be applied.

Finally, couldn't it be considered that it targets situations where the Commission makes economic policy choices? This is the approach I heartily recommend. It somehow echoes what former Judge Bellamy induced in his attempt to categorise types of facts. Indeed, economic assessments could refer to situations where

the Commission deals with Judge Bellamy's second category of facts, that is 'economic facts', whereas complex economic assessments would involve facts of his third category, where 'one is probably moving away from facts strictly so-called and almost entering the question of policy'.¹³² Or in the words of Judge Forwood, complexity here would refer more to the nature of assessment that needs to be made, rather than its technical or evidential difficulty.¹³³ Where the case under review involves Commission value judgements such as, for instance, under Article 101(3) TFEU, in which a balance has to be made between anticompetitive effects and pro-competitive efficiencies, the General Court's judicial review would be less intensive than in controlling market definitions, products substitutability, the existence of a dominant position, or of an abuse.

Such clarification of the definition of the event triggering a marginal review would result in a clear line of judgment. First, situations implying elements of economic policy would be clearly excluded from a comprehensive review. This exclusion means that, on the one hand, judges would be prevented from substituting their own assessment for the Commission's and, on the other hand, judges would still exercise a deep and intense review as specified in the *Tetra Laval*'s 'forgotten' paragraph. Second, all other economic elements—irrespective of their level of intricacy—in a decision subject to the EU Court's control would be examined under the full review. I already hear objections: will judges be competent to undertake such detailed review involving economics? Indeed, before giving their ruling, judges need to be able to understand the rule itself and the situation to which it applies. It is therefore necessary to address this issue.

2. Need to define how

As seen above, complexity is the key element triggering the application of a marginal review. However, to limit the debate on the definition of 'complexity' would be a short-sighted analysis. Indeed, once the policy element which benefits from the Commission's discretion immunity has been identified and put aside, the other elements have to undergo a detailed review from the General Court's judges.

127 Case 385/07 P *Der Grüne Punkt—Duales System Deutschland v Commission* [2009] ECR I-6155.

128 After the accession of the EU to the European Convention on the protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights may consider such a position as infringing fundamental rights, see below note 152 and accompanying text.

129 Joined cases C-204/00 P, C-211/00 P, C-217/00 P and C-219/00 P *Aalborg Portland A/S and Others v Commission* [2004] ECR I-123.

130 Case T-28/03 *Holcim v Commission* [2005] ECR II-1357.

131 *Ibid.*, para. 98.

132 C Bellamy, in 'Judicial Enforcement of Competition Law', OECD, Policy Roundtables, 1996, p. 106: <<http://www.oecd.org/dataoecd/34/41/1919985.pdf>> accessed 29 May 2011.

133 Forwood, 'The Commission's More Economic Approach—Implications for the role of the EU Courts, the treatment of economic evidence and the scope of judicial review' (n 91) 13.

In 20 years, the evolution of the General Court, originally conceived as a specialised court, has left this image far behind. The modification of its name induced by the Treaty of Lisbon does not only reflect the fact that this jurisdiction hears cases on appeal from the Civil Servant Tribunal but also that, after 20 years of existence, it has moved from a limited-competence to a by-default-competent court. It thus deals with cases ranging from access to documents, to agriculture, passing through terrorist cases, seal hunting, and green gas effect cases among many other fields. Competition law, and more particularly competition economics-related questions, are thus only one of the General Court's concerns. However, doctrine and practitioners often advocate for a specialisation of the judges in these issues concerned by the fact that the meaning of 'complexity' could slip to 'difficulty to grasp' leading to much more of the Commission's economic analysis being conducted under a less intensive standard of review and creating a soon-to-be ocean of Commission discretion.

While the nomination of judges with a specific understanding of economics would undisputedly not do any harm,¹³⁴ the first and foremost abilities required from a judge is his or her independence and capacity to discern what is relevant and to disregard what is not, whatever the complexity or the matter of the question submitted to his or her decision. Significantly, Article 254 TFEU provides that '[t]he members of the General Court shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office.' To require that judges shall dispose of a specific expertise in a given field—economics or something else (e.g. intellectual property, computing science, chemicals)—would thus risk going beyond the letter and the spirit of the treaty. Additionally, from a practical and political point of view, one can hardly see how the margin of discretion enjoyed by Member States when proposing their candidates could be restrained in such a way. Similarly, considering the report of activity of the panel provided for in Article 255 TFEU, made public on 17

February 2011,¹³⁵ even though it has already shown its ability to endorse its role boldly, nothing allows us to envisage that the panel will go in this direction (without prejudice to the question of whether this would be in compliance with the mandate of the panel as defined in Article 255 TFEU).

What could be easily achieved through the creation of a specialised tribunal on the basis of Article 257 TFEU (i.e. the nomination of specialised judges, as has already been done on the occasion of the creation of the Civil Service Tribunal) seems difficult to reconcile with the generalist nature of the General Court, as envisaged by the treaty itself. It remains important that particular attention be paid by Member States, when making their proposals, that the expertise of their candidates in relation to the substantive issues the General Court deals with, must continue to ensure that the diversity of the backgrounds of judges mirrors the growing diversity of cases.

Coming back to the specific issue of economics understanding, it should not be forgotten that, if needed, the General Court disposes of several means in order to get assistance from experts, be it on a permanent (the General Court employed an economist for six years in the 1990s)¹³⁶ or *ad hoc* basis. As to the latter, often cited as one of the rare cases in which the Court hired its own experts, the *Woodpulp* case stands somewhat alone in that regard.¹³⁷ In this case, the Court decided to obtain a first expert's report on parallelism of prices and to review the Commission's documents in that regard and, then, a second expert's report was ordered on the market characteristics.¹³⁸ The reports' findings are heavily quoted in the judgment and might have seriously helped to build the judges' reasoning to ultimately find that '[i]n the absence of a firm, precise and consistent body of evidence, it must be held that concertation regarding announced prices has not been established by the Commission' and led to a partial annulment of the Commission's decision.¹³⁹ The question is thus raised: should the General Court more often appoint its own economic experts? If the rarity of the use of this tool is sometimes underlined with

134 By the way, it is worth noting that several judges currently holding office at the General Court have both an economic and legal background.

135 Council of the European Union, 'Note de transmission', 6509/11, COUR 3, JUR 57.

136 I Knable Gotts, DA Schwartz, DG Didden and DE Hemli, 'Nature vs. Nurture and Reaching the Age of Reason: The U.S./E.U. Treatment of Transatlantic Mergers' (2005) 61 N.Y.U. Annual Survey of American Law 453.

137 Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others v Commission* (n 126). See also, Case 48/69 *Imperial Chemical Industries Ltd. v Commission* [1972] ECR 619, pp. 649–650.

138 Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others v Commission* (n 126) paras 31–32, 75 s.

139 *Ibid.*, paras 75–138.

regrets,¹⁴⁰ not everyone calls for more frequent exercise of this possibility.¹⁴¹ However, we should not lose sight of the fact that the use of these tools, that is having recourse to an expert in economics for a case or on a permanent basis, could be time-consuming and could increase the duration of proceedings for cases whose average duration in 2010 was around 45 months. In addition, in cases where economic issues are at the heart of the dispute, parties (both applicants and defendants, not even mentioning intervening parties) themselves provide the Court with various, detailed, and adverse economic reports, thanks to which the judge is in a situation to form his or her own opinion.

Judge Forwood observed that the proposal according to which a more economic approach leads to better results remains true only as long as the decision taker has access to all relevant data and has the appropriate resources to carry out the necessary economic analysis.¹⁴² I would add that this proposition is flawed if the reviewers, and foremost the General Court, are not in possession of a comparable toolbox.¹⁴³ This toolbox exists and the future will prove if the 'more economic approach' followed by the European authority in charge of competition policy leads to more frequent use of the tools at the disposal of the judge.

Finally, what about complex 'technical' assessments? In its non-appealed judgment *Microsoft*, the General Court reiterated 2005 *Tetra Laval*'s statement¹⁴⁴ and then applied it to the Commission's complex technical appraisals in further specifying that 'in so far as the Commission's decision is the result of complex

technical appraisals, those appraisals are in principle subject to only limited review by the Court, which means that the Community Courts cannot substitute their own assessment of matters of fact for the Commission's'.¹⁴⁵ It also specified '[h]owever, while the Community Courts recognise that the Commission has a margin of appreciation in economic or technical matters, that does not mean that they must decline to review the Commission's interpretation of economic or technical data. The Community Courts must not only establish whether the evidence put forward is factually accurate, reliable, and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it'.¹⁴⁶ More recently, the General Court followed this approach in its judgments in *Clearstream*,¹⁴⁷ *Amann & Söhne and Cousin Filterie*,¹⁴⁸ and *AstraZeneca*.¹⁴⁹

The same logic is therefore followed here with regard to another type of complex assessments. Should the judges not only be economists but also technicians, engineers, biochemists, plumbers? EU legislation is indeed also peppered with technical vocabulary and concepts. Just think of REACH... We clearly see now that the debate about judges not being familiar with economics is misplaced.

IV. Conclusion

In my closing statement at the event organised to celebrate the twentieth anniversary of the General Court,

140 See, for instance, D Geradin and N Petit, 'Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment' (n 4) 24. It should also be noted that, in Case C-413/06 P *Bertelsmann and Sony Corporation of America v Impala* (n 75), the appellant and the Commission put forward a plea arguing that the General Court exceeded the scope of its role in carrying out judicial review and alleged that the General Court substituted its own assessment for that of the Commission, without *inter alia* asking for a report from an economic expert to be obtained (para. 138).

141 See, for instance, Forrester, 'A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review' (n 2) 31, who suspects that 'many practitioners would prefer to rely on experts whom they choose, brief and present themselves, rather than having a single neutral court-appointed expert.' It should be added that, in practice, the parties or interveners have already requested renowned experts to draft detailed economic reports for the purpose of the administrative proceedings or in the perspective of judicial proceedings. The added-value of a supplementary report elaborated by an independent expert on request from the General Court has thus to be weighted carefully. Indeed, not only may the added value be quite low, such reports being mainly limited to underlining inconsistencies of the submitted reports (mistakes that would have already been spotted by the parties themselves in their defence or reply), but it may also be time-consuming to analyse and contradictorily discuss a new report while reasonable delay hangs like the sword of Damocles over the General Court. See in that regard, Y Botteman, 'Mergers, standard of proof and expert economic evidence' (2006) 2 (1) *Journal of Competition Law and Economics* 71–100, footnote 58.

142 Forwood, 'The Commission's More Economic Approach—Implications for the role of the EU Courts, the treatment of economic evidence and the scope of judicial review' (n 91) 3.

143 Some observers consider that this requirement is satisfied within the context of EU jurisdictions and it is for them to make the most of it. See, among many others, M Siragusa's contribution for the workshop 'Access to Justice' organised at the occasion of the 'Celebration of 20 years of the Court of First Instance of the European Communities' on 25 September 2009 (n 3); and Forrester, 'A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review' (n 3) 37, 41–3.

144 Case C-5/02 *Tetra Laval v Commission* (n 26) para. 87.

145 *Ibid.*, para. 88 (emphasis added) and the case law quoted as regards a decision adopted following complex appraisals in the medico-pharmacological sphere, order of the President of the Court of Justice in Case C-459/00 Pr *Commission v Trenker* [2001] ECR I-2823, paras 82 and 83; see also, to that effect, Case C-120/97 *Upjohn* [1999] ECR I-223, para. 34 and the case law cited; Case T-179/00 *A. Menarini v Commission* [2002] ECR II-2879, paras 44 and 45; and Case T-13/99 *Pfizer Animal Health v Council* [2002] ECR II-3305, para. 323.

146 Case C-5/02 *Tetra Laval v Commission* (n 26) para. 89 (emphasis added).

147 Case T-301/04 *Clearstream v Commission* (n 42) paras 94 s.

148 Case T-446/05 *Amann & Söhne and Cousin Filterie v Commission* (n 61) para. 131.

149 Case T-321/05 *AstraZeneca v Commission* (n 44) paras 32–33.

I particularly noted the wish expressed by certain interveners and participants for an intensification of the standard of review in areas involving complex economic assessments.¹⁵⁰ A need to deepen the reflection came out clearly from these debates.

Although the review of the relevant case law on this issue informed the materiality of many comments, it nevertheless offered an opportunity for a more structured and constructive discussion. This analysis tends to show two features: first, the General Court exercises a standard of review respectful of the institutional balance as set out in the treaties in applying a marginal review to elements of the Commission's decision that come within the margin of appreciation of this institution. Second, this control remains intense even when confronted with complex economic assessments.

Three usual misconceptions should therefore be avoided. The first mistake is to stay stuck on the deferential language used in *Tetra Laval's* often cited paragraph. This was just—and still is—the recognition of the separation of powers as determined within the treaties. The second mistake is to confuse marginal with light. Far from being an abandonment of their duty to control complex economic assessments, the marginal review remains intense as defined by the EU Courts in *Tetra Laval's* too often forgotten paragraph. The third mistake is to confuse complex economic assessments with complex economic studies, calculations, or data. There should be no 'deference' as to these types of evidence on which the Commission may rely in its decisions. Complex economic assessments should be understood as situations where the Commission has to make an economics-based choice of policy. It should only be in such situations that marginal review should be applied—and, once again, with the intensity required in *Tetra Laval's* too often forgotten paragraph. Once these three mistakes are avoided, the fear of light judicial control and of its extension due to the rise of economics vanishes.

However, it cannot be denied that the lingering doubts—the pertinence of which is confirmed by this review—about the exact meaning of the expression 'complex economic assessments' could lead to some inconsistencies. This lack of clarity about an essential criterion defining the judicial control's intensity—and, consequently, the role of the judge—is definitely not satisfying and, having regards to today's context, it

could be time to clear up this uncertainty. In addition to legal uncertainty, a misunderstanding of this expression—the consequence of which is the application control that is too loose to situations that deserve a stricter standard of review—could affect the effectiveness of judicial review. In that regard, it should be stressed that effective judicial review is a fundamental right recognised under the European Convention for the Protection of Human Rights and Fundamental Rights (ECHR) and the Charter of Fundamental Rights of the European Union (the 'Charter'). With the entry into force of the Lisbon Treaty on 1 December 2009, on the one hand, the Charter became binding and now constitutes an integral part of EU law and, on the other hand, accession of the EU to the ECHR was raised to the rank of a mandatory objective.¹⁵¹ Consequently, if the rise of economics leads us to scrutinise the application of the standard of review applied in cases of complex economic assessments and clarify it, the rise of human rights *must* lead us to make sure that the actual standard of review applied complies with the requirement of effective review.

Therefore, the move I advocate echoes the call I formulated with regard to the need for clarity in the application of the General Court's standard of review in assessing fines imposed by the Commission to sanction an infringement in cartel proceedings.¹⁵² Complexity in economic assessments should relate to the elements in Commission decisions of economic policy for which the judge must avoid substituting his or her own appraisal. For those elements, marginal review should be the correct standard of review, applied however with the intensity described in *Tetra Laval's* 'forgotten' paragraph; all other elements being control under the full review. Such an approach would put to bed the fear that the penetration of economics in all areas of competition law could lead to a shrinking of the judicial control. It should be noted that this reflection goes beyond economics and embraces all technical cases.

Finally, determination of the right standard of review is the first step towards the satisfaction of effective judicial review. To be completely effective, the exercise of the judicial review must also be concretely feasible. If I believe that the General Court has at its disposal a powerful toolbox that, in case of need, may be used and judges do not necessarily need to be specialised in a discipline other than law, it is impor-

150 See my closing statement given at the occasion of the 'Celebration of 20 years of the Court of First Instance of the European Communities' on 25 September 2009 (n 1) p. 267.

151 On these issues, see for instance, W Weiss, 'Human Rights and EU antitrust enforcement: news from Lisbon' (2011) 32 (4) European

Competition Law Review 186–95. See also my contribution entitled 'Standard of review in competition cases: can the General Court increase coherence in the European Union judicial system?' (n 2) 130–3.

152 Ibid., p. 139.

tant to make sure that the rarity of recourse to these tools—such as expertise—does not find its origin in a self-censorship due to the risk of an increase in the duration of the proceedings. Indeed, such a reason would undermine the effective requirement of judicial review and, consequently, would have to be addressed. On the other hand, one should wary not to put the resolution of the dispute into the hands of non-legal

experts. Expertise, in economics and elsewhere, should have for its sole purpose giving assistance to the judge in performing the task that only he or she is solely in charge of: determining whether the law has been breached or not.

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